NO. 48119-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

JONATHAN P DUENAS, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.14-1-01604-2

BRIEF OF RESPONDENT

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B. STATEMENT OF THE CASE

Jonathan Duenas (hereafter 'Duenas') was convicted by a jury in Clark County Superior Court of Rape of a Child in the First Degree, two counts of Child Molestation in the First Degree, and one count of Child Molestation in the Third Degree. CP 39-42. The trial court imposed a standard range sentence, and Duenas filed the instant appeal. CP 79.

The charges involved allegations by the State that Duenas molested and raped his girlfriend's daughter, H.A., when she was nine years old, and molested his girlfriend's daughter, K.L. when she was 14 years old. Prior to trial, the State moved to admit statements H.A. made about the abuse to her mother and her sister when she was nine years old pursuant to RCW 9A.44.120. CP 82. The trial court held a hearing prior to trial to determine the admissibility of the statements under RCW 9A.44.120. CP 110-12; RP 5.

At the hearing, K.L. and H.A.'s mother, Heather,[1] testified that K.L. and H.A. are her daughters, and that Duenas was her fiancé with whom she and her children lived. RP 32-33. At the hearing, Heather testified that she first found out about the abuse on July 4, 2013 when her daughter K.L. told her that Duenas had touched H.A. RP 34. Heather immediately went home to talk to H.A., and took her in her car to a nearby school and talked to her. RP 34-35. H.A. was nine years old at the time. RP 32-33. Heather first asked H.A. if there was anything she needed to tell her, and H.A. said no. RP 35. Heather then said that K.L. had already told her something that she thought was important and she felt that H.A. should

[1] Throughout its brief the State refers to the victims' mother as 'Heather.' By doing this, the State intends no disrespect, but calls her by her first name so as to avoid using her surname which is the same as one of the victim's.

tell her. RP 35. H.A. started crying and told her mom that Duenas had been touching her and pointed to her vagina. RP 36. She indicated Duenas had gotten into her bed and rubbed on her. RP 36. H.A. said she couldn't yell for help and didn't tell him to stop, that she just "froze." RP 37.

K.L. testified at the hearing that in the middle of June 2013 her sister, H.A. told her she had something important to tell her. RP 24. H.A. told K.L. that she had been lying in bed and Duenas asked to lie down by her and he touched her. RP 25. H.A. then pointed to her vagina and mimicked a rubbing motion. RP 25-26. K.L. believed H.A. was scared and did not want to tell anyone. RP 26. K.L. decided to tell their mother, and did so on July 4, 2013 when they were driving to the mall. RP 26-27.

Heather indicated her relationship was great and her children were happy. RP 33. No one had any huge issues or problems with Duenas. RP 33-34.

The trial court ruled the statements H.A. made to K.L. and Heather were admissible pursuant to RCW 9A.44.120 as they were reliable, considering the *Ryan* factors. RP 44-45.

At trial, Heather testified she has two daughters: K.L was born on January 6, 1999, and H.L was born on July 29, 2003. RP 119-20. Neither child has ever been married. RP 120. Heather and Duenas dated for about three and a half years, and were engaged to be married. RP 135-36. They

lived together, and Heather stopped working to stay at home with the children while Duenas worked. RP 136-38. It was a "loving relationship," and she and Duenas supported each other and loved each other. RP 150.

On July 4, 2013, Heather went to the mall with K.L., her son K., her aunt, and a close friend. RP 121-22. H.A. and Duenas were left at home alone. RP 122. H.A. was upset at being left at home and was throwing a fit. RP 123. As she drove towards the mall, Heather started to feel uncomfortable about having left H.A., and stated that she hoped H.A. was going to be okay, and her daughter K.L. said, "yeah, me too." RP 123-24. Heather probed K.L., asking her what she meant by that. RP 124. K.L. told Heather that Duenas had been touching H.A. RP 124. K.L. was crying when she said this, and told Heather she hadn't wanted to tell her. RP 125. Heather asked K.L. where he was touching her, and K.L. said "down there." RP 125. Heather "freak[ed] out" upon hearing this, and immediately turned her car around and headed home. RP 126.

Once home, Heather told H.A. to come outside and took her to a nearby school and parked. RP 127-28. Once there, Heather asked H.A. if there was anything she wanted to tell her. RP 128. H.A. replied, "no." RP 128. Heather then told H.A. she was concerned and that as her mom she was there to protect H.A. and that H.A. could tell her the truth. RP 128. Heather testified that she said, "[l]et me make this easy on you... K[.L.]

told me that [Duenas] had been touching you. Is that true? Is there anything you want to tell me?" RP 128. H.A. again said no, but then said, "yeah." RP 128. At this point both Heather and H.A. were crying; H.A. appeared upset and scared. RP 129. H.A. told her mom that Duenas had been touching her "down there" and pointed to her "privates." RP 129. By "privates" Heather means vagina. RP 130. On cross-examination, Heather clarified her testimony and indicated that she did not tell H.A. that K.L. had told her H.A. had been "inappropriately touched," or anything like that. RP 163-64. Heather told H.A. that K.L. had already told her something that was important for H.A. to tell her. RP 164.

H.A. told Heather that it happened when Heather was in Louisiana visiting her aunt; Duenas came into her room, laid by H.A. on her bed and "rubb[ed] on her." RP 129. Heather asked H.A. if she said no, or screamed, but H.A. said she couldn't, that she was just "stiff." RP 129. Heather went to Louisiana from February 23, 2013 to February 27, 2013. RP 139.

K.L. and H.A. decided not to tell Heather at the time because Heather was not working and they believed they would be homeless and kicked out of their home if they told. RP 131.

After H.A. told Heather what had happened, Heather called 911. RP 132. An officer responded and spoke with Heather, and told her during

the investigation not to discuss the case with her children, or solicit information from them so as not to tamper with them. RP 133-34. After speaking with police Heather then returned home and asked Duenas to leave the house. RP 135-36.

Over that summer, Heather had noticed that H.A. was developing an attitude problem, becoming "snotty" and "back talking" and did not want to follow the rules or listen. RP 138.

On cross-examination, Duenas's attorney engaged in the following exchange with Heather:

> Defense Attorney: And we've asked this question before, but let's ask – they're good kids and they do the right thing most of the time –
>
> Heather: Yes.
>
> Defense Attorney: --isn't that true? But they do lie on occasion.
>
> Heather: I would believe every once in a while, yes.

RP 158. On redirect, the prosecutor engaged in the following exchange with Heather without objection from defense:

> Prosecutor: Defense counsel asked if they would occasionally not be completely honest as kids, correct?
>
> Heather: Correct.
>
> Prosecutor: And they've told a fib or two in their day?
>
> Heather: Yeah.

> Prosecutor: Okay. Now, if they would be not forthcoming with you, would it be about smaller stuff or would it be about a massive issue like this?
>
> Heather: I think it would be smaller –I – something like this is not something that's just made up or something that they're going to lie about. It's—I mean, I can tell, especially when my kids are, like, Well, we weren't going to tell you, but—you know what I mean? Like, it's not something that's just – yeah. I don't know how to explain it.

RP 159-60.

H.A. testified at trial that she did not exactly remember everything that happened. RP 193. She described once when Duenas laid down in bed with her and touched and rubbed her vagina with his finger under her clothing. RP 194-97. She rolled over on her side and said, "stop." RP 198. H.A. had told the police that during this incident Duenas inserted two fingers inside her vagina. RP 244; Ex. 14. H.A. testified that on another occasion her mom was out of town in Louisiana and her sister K.L. was at a sleepover. RP 200. H.A. slept in her mother's bed one night, and Duenas was in bed on one side of her. RP 201-02. Duenas touched her on her vagina under her clothing with his finger. RP 202-03. H.A. wrapped herself up in a blanket and the touching stopped. RP 203.

H.A. later told her sister, K.L., about Duenas touching her. RP 205. K.L. told her mom a few weeks later while in a car with her and her aunt and her mom's friend on July 4, 2013. RP. 277. During the car ride, her

aunt asked K.L. if Duenas had touched her. RP 277. K.L. then told them what had happened to her. RP 277. Duenas touched K.L. one time two years prior to trial. RP 265. The touching occurred while they were watching a movie on the couch, and Duenas started rubbing K.L. on her calves, then moved his hand up to her thigh and then traced the outline of her vagina with his finger. RP 269-71. K.L. felt shocked, confused and was "frozen" when this occurred. RP 271.

Duenas was contacted by police during the investigation of this case, and told police that he did not remember watching a movie with K.L. and rubbing her leg. RP 333. Duenas also told police that he was "pretty sure" he never touched K.L.'s vagina over her clothing. RP 333-34. Duenas denied ever touching H.A. or K.L. RP 328.

The jury found Duenas guilty of all counts, including one count of Rape of a Child in the First Degree involving H.A., two counts of Child Molestation in the First Degree involving H.A., and one count of Child Molestation in the Third Degree involving K.L. CP 39-42.

C. ARGUMENT

I. The Testimony of the victims' mother was properly admitted at trial

Duenas argues the trial court erred in allowing testimony of one witness commenting on the credibility of another witness, and that his

attorney was ineffective for failing to object to this testimony at trial. Duenas cannot raise this issue for the first time on appeal as he failed to preserve the issue below and it is not a manifest constitutional error. Furthermore, the evidence was properly allowed as defense opened the door to such evidence, and his attorney was not ineffective because soliciting evidence the victims did lie was tactically reasonable. Duenas's claims fail.

a. Duenas Cannot Raise this Issue for the First Time on Appeal

Initially, Duenas has not preserved this issue for review. Duenas did not object at trial to the testimony he now complains of. Generally, a person may not raise an issue for the first time on appeal. RAP 2.5(a). However, RAP 2.5(a)(3) permits review of constitutional claims that are raised for the first time on appeal if they involve a question of manifest constitutional magnitude. RAP 2.5(a)(3); *State v. Scott*, 110 Wn.2d 682, 687-88, 757 P.2d 492 (1988). Our Supreme Court has rejected the argument that all claimed trial errors which implicate a constitutional right may be reviewable under RAP 2.5(a)(3), noting that "[t]he exception actually is a narrow one, affording review only of 'certain constitutional questions.'" *Id.* at 687 (citing to Comment (a), RAP 2.5, 86 Wn.2d 1152 (1976). Appellate courts should not approve of a defendant's failure to

object at trial when such an objection would have identified an error that the trial court would have corrected through striking testimony or giving a curative instruction. *Id.* at 685. The term "manifest" in this situation requires a showing of actual prejudice. *State v. Walsh*, 143 Wn.2d 1, 8, 17 P.3d 591 (2001); *State v. McFarland*, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995). Exceptions to RAP 2.5(a) should be construed narrowly, and to prevail the defendant must show that the claimed error had identifiable consequences in the trial of his case. *State v. WWJ Corp*, 138 Wn.2d 595, 603, 980 P.2d 1257 (1999). By not objecting, Duenas deprived the trial court of the opportunity to prevent error or to cure it.

"Admission of witness opinion testimony on an ultimate fact, without objection, is not automatically reviewable as a 'manifest' constitutional error. 'Manifest error' requires a nearly explicit statement by the witness that the witness believed the accusing victim." *State v. Kirkman*, 159 Wn.2d 918, 936, 155 P.3d 125 (2007). There was no explicit statement by Heather that the victims were honest about the abuse or that she believed the defendant was guilty. Thus the error was not manifest. Additionally, there has been no showing of actual prejudice. Clearly, Duenas's counsel knew the victims' mother believed her children lied about small things, as all children do, but do not generally lie about big things. He knew this prior to asking the question. The way the

question was phrased clearly evidences their prior conversation on the subject. Tactically, Duenas's counsel believed having evidence in the record that the victims did lie, about anything, was good evidence for his client, and good enough evidence that opening the door to allowing the State to show the victims only lied about small things was worth the gain of having evidence, from their own mother, of the victims' propensity to lie in the record.

Further, the jury was instructed that it was the sole judge of witness credibility and the sole trier of fact. The first instruction from the court told the jury that they were "the sole judges of the credibility of the witnesses and of what weight is to be given to the testimony of each." CP 20. Jurors are presumed to follow the court's instructions. *State v.* Dye, 178 wn.2d 541, 556, 309 P.3d 1192 (2013). This type of instruction has been found to cure judicial comments on the evidence, *State v. Ciskie*, 110 Wn.2d 263, 283, 110 P.2d 1165 (1988), and could also cure potential improper opinion testimony.

There was no explicit or near explicit statement on Heather's belief of the victims' honesty about this case, or about Duenas's guilt in this case. Clearly, Duenas weighed the pros and cons of eliciting the evidence of the victims lying, which opened the door to this now complained-of

testimony. There was no manifest constitutional error here. Duenas's claim fails.

b. The Evidence was Properly Admitted

The testimony admitted through Heather was properly admitted as Duenas had attacked K.L.'s and H.A.'s character for truthfulness. The defense theory of the case was that the victims were lying about what took place because they did not like Duenas and did not want him to marry their mother, and Duenas showed through his cross-examination of Heather that the victims did, in fact, lie. RP 158. Thus, Heather's testimony that her daughters did not lie about big things was not an impermissible opinion. By eliciting the fact that the victims had lied in the past, Duenas opened the door to rebuttal evidence regarding specific instances of conduct. The trial court has broad discretion under ER 608(b)(2) to allow inquiry into specific instances of conduct, if probative for truthfulness or untruthfulness, 'concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.' ER 608(b)(2). Here, Duenas elicited testimony from Heather that her daughters have lied about things before. RP 158. In light of that, the trial court did not err by allowing the State to inquire as to whether there had been issues with the victims lying about small things or big things.

Typically, a witness's credibility may only be attacked or supported by reputation evidence regarding the witness's character for truthfulness or untruthfulness. ER 608(a); *State v. Land*, 121 Wn.2d 494, 497, 851 P.2d 678 (1993). This rule exists though alongside the general rule that evidence that might otherwise be inadmissible is admissible if a witness opens the door to the evidence and the evidence is relevant to some issue at trial. *See, e.g., State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17 (1969); *State v. Gallagher*, 112 Wn.App. 601, 609, 51 P.3d 100 (2002), *rev. denied*, 48 Wn.2d 1023 (2003); *State v. Stockton*, 91 Wn.App. 35, 40, 955 P.2d 805 (1998). If a witness testifies to his or her own good character on direct, the opposing party may make further inquiries during cross-examination. *Stockton*, 91 Wn.App. at 40 (citing *Gefeller*, 76 Wn.2d at 455).

Whether a witness's character was brought into question by the opponent, either by reputation evidence or 'otherwise,' so as to open the door to evidence of the witness's good character under ER 608 depends on the nature of the opponent's inquiry. A party may "open the door" during the questioning of a witness to evidence that may otherwise be inadmissible. *State v. Korum*, 157 Wn.2d 614, 646, 141 P.3d 13 (2006). In *State v. Gefeller*, 76 Wn.2d 449, 458 P.2d 17 (1969), the Supreme Court explained:

> It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it. Rules of evidence are designed to aid in establishing the truth. To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths. Thus, it is a sound general rule that, when a party opens up a subject of inquiry on direct or cross-examination, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced.

Gefeller, 76 Wn.2d at 455. Under this doctrine, the trial court has the discretion to admit evidence that otherwise would have been inadmissible when a party raises a material issue and the evidence in question bears on that issue. *State v. Berg*, 147 Wn.App. 923, 939, 198 P.3d 529 (2008). "[O]nce a party has raised a material issue, the opposing party is permitted to explain, clarify, or contradict" the evidence regarding that issue. *Id.* at 939.

Further, the open door rule allows a party "to introduce evidence on the same issue to rebut any *false* impression" created by the other party. *U.S. v. Sine*, 493 f.3d 1021, 1037 (9th Cir. 2007) (emphasis original); *see also State v. Fisher*, 165 Wn.2d 727, 750, 202 P.3d 937 (2009) (stating "[w]here the defendant 'opened the door' to a particular subject, the State may pursue the subject to clarify a false impression."). When a party

directly attacks a witness's truthful character, no doubt exists that that character has been attacked. *State v. Harper*, 35 Wn.App. 855, 860, 670 P.2d 296 (1983) (citing 4 John Henry Wigmore, Evidence 235 sec. 1105 (1972 rev. ed.)).

Here, Duenas 'otherwise' attacked K.L.'s and H.A.'s character for truthfulness, and thereby opened the door to further testimony on the subject. Duenas's entire defense lay in the veracity and credibility of K.L. and H.A., and his strategy at trial was to attack their credibility.

Duenas questioned H.A. and K.L. about their lack of memory and inconsistency in their statements. RP 246-290. Duenas also questioned K.L. about not immediately telling anyone what happened even though her family was nearby. RP 282. Duenas argued to the jury that the inconsistencies, delayed reporting and lack of corroborative evidence showed the events did not occur. RP 413-22. Duenas asked Heather if her daughters lied. The logical purpose of that question was to undermine the victims' credibility, by suggesting they had lied previously and were lying now about being abused. Thus by 'otherwise' attacking K.L.'s and H.A.'s credibility, defense opened the door to re-direct examination on the issue of their credibility.

In *State v. Berg*, 147 Wn.App. 923, 198 P.3d 529 (2008), *disapproved of on other grounds by State v. Mutch*, 171 Wn.2d 646, 254

P.3d 803 (2011), Division I of this Court found the defendant opened the door to a detective's opinion on the credibility of the child victim. In *Berg*, the defendant asked the detective if any family members were supporting the child victim. *Berg*, 147 Wn.App. at 938. None had. *Id.* On redirect, the prosecutor asked the detective whether it was unusual for that to happen, and he said no. *Id.* On appeal, the defendant argued the detective's testimony constituted an opinion on credibility and was irrelevant. *Id.* at 938. Division I found that the defendant opened the door to this evidence by its questioning of the detective. *Id.* As in *Berg*, Duenas opened the door to the prosecution's questioning of Heather regarding the specifics of the alleged lying by the victims.

Though even when a witness's character for truthfulness has been attacked, evidence of the truthful character of that witness may be introduced in the form of reputation evidence, not in the form of an opinion. ER 608(a)(2); *State v. Smith*, 56 Wn.App. 909, 912, 786 P.2d 320 (1990), *abrogated on other grounds by State v. Thomas*, 98 Wn.App. 422, 989 P.2d 612 (1999). But Heather's statements that her children lied about little things and not big things were not an opinion, but rather a factual statement. Generally, our case law indicates that a prosecutor may not ask a witness if she believes the victims are telling the truth about the charged incidents. *See, e.g., State v. Jerrels*, 83 Wn.App. 503, 507-09, 525 P.2d

209 (1996); *State v. Suarez-Bravo*, 72 Wn.App. 359, 366, 864 P.2d 426 (1994). However, the questions asked by the prosecutor here were not the type prohibited by *Jerrels, supra* and *Suarez-Bravo, supra*. The prosecutor in Duenas's case did not ask Heather if she believed the victims were telling the truth about the sexual abuse; the prosecutor only clarified the extent of the lying the victims have engaged in, to rebut Duenas's attempt to portray these victims as general liars. Duenas's questioning of Heather left a false impression in the jurors' minds that the victims were liars, but upon clarification, it was shown they engage in petty lying like all children, and not as frequently as Duenas would have had the jurors believe. RP 158.

c. Defense counsel was Not Ineffective for Failing to Object to the Opinion Testimony

Duenas claims that in the alternative his attorney was ineffective for failing to object to the admission of Heather's testimony on re-direct. As discussed above, this evidence was properly admitted based on Duenas opening the door and attacking the victims' credibility and leaving a false impression in the minds of the jurors. Thus any objection by Duenas would not have been sustained. Duenas cannot show he was prejudiced by his attorney's failure to object to this testimony. Duenas's claim of ineffective assistance of counsel fails.

As discussed in detail below, in order to prevail on a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance was deficient and that this deficiency prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Under this standard, trial counsel's performance is deficient if it falls "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The threshold for the deficient performance prong is high, given the deference afforded to decisions of defense counsel in the course of representation. To prevail on an ineffective assistance claim, a defendant alleging ineffective assistance must overcome "a strong presumption that counsel's performance was reasonable." *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Accordingly, the defendant bears the burden of establishing deficient performance. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A defense attorney's performance is not deficient if his conduct can be characterized as legitimate trial strategy or tactics. *Kyllo*, 166 Wn.2d at 863; *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) (holding that it is not ineffective assistance of counsel if the actions complained of go to the theory of the case or trial tactics) (citing *State v. Renfro*, 96 Wn.2d 902, 909, 639 P.2d 737 (1982)). Prejudice is only shown if there is a reasonable probability that absent the attorney's unprofessional errors, the result

would have been different. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 672-73, 101 P.3d 1 (2004). The reasonableness of an attorney's performance is reviewed in light of all the circumstances of the case at the time of the alleged misconduct. *State v. Lord*, 117 Wn.2d 829, 883 P.2d 177 (1991).

Duenas claims his attorney was ineffective for failing to object to the testimony of Heather regarding her daughters lying. In order to show the attorney was ineffective, Duenas must show that the objection would have been sustained. *State v. Johnston*, 143 Wn.App. 1, 19, 177 P.3d 1127 (2007) (citing to *Davis*, 152 Wn.2d at 748). "An attorney's decision regarding whether and when to object fall firmly within the category of strategic or tactical decisions." *Id.* (citing *State v. Madison*, 53 Wn.App. 754, 763, 770 P.2d 662 (1989)). The failure to object only establishes ineffective assistance of counsel in the most egregious of circumstances. *Id.* Further, this Court presumes that the failure to object was the result of legitimate trial strategy or tactics, and the onus is on the defendant to rebut this presumption. *Id.* at 20 (citing *Davis*, 152 Wn.2d at 714).

Duenas does not explain why his attorney's failure to object was not a tactical decision. This evidence also does not demonstrate an absence of a legitimate trial strategy. Counsel need not make every possible objection, and tactically, it may be better to save objections for when they

will be sustained. It was clear below that Duenas's attorney had a legitimate tactic in eliciting the evidence he did from Heather on cross-examination. That admission opened the door to the evidence the State elicited from Heather on re-direct. Any objection Duenas's attorney would have made at that point would have been overruled. Thus strategically, Duenas's attorney had good reason not to object, but even if he didn't, Duenas cannot now show prejudice as it is clear from the law discussed above that any objection would have been overruled as the evidence was properly admitted. Alternatively, had Duenas objected, the trial court may have stricken the testimony elicited by Duenas about the victims lying as a remedy for the unanswered impression left by this testimony.

Duenas has not shown his attorney's failure to object was not a tactical decision and therefore this court presumes the failure to so object was the result of a legitimate trial tactic. Furthermore, Duenas has not shown prejudice as any potential objection would not have been sustained. Duenas's claim of ineffective assistance of counsel fails.

d. The Prosecutor did not Commit Prosecutorial Misconduct for Eliciting this Testimony

Duenas alternatively argues the prosecutor committed misconduct by eliciting the testimony from Heather. Duenas cannot show the

prosecutor's questioning was improper, nor can he show prejudice from this questioning. Duenas's claim of prosecutorial misconduct fails.

To prevail on a claim of prosecutorial misconduct, the defendant must show both improper conduct and a prejudicial effect. *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995). If misconduct did occur, reversal is only required if there is a substantial likelihood that the jury's verdict was affected by the error. *Id.* When a defendant fails to object to the misconduct at the trial court, this Court applies a heightened standard of review, determining whether the prosecutor's misconduct was "so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." *State v. Allen,* 182 Wn.2d 364, 375, 341 P.3d 268 (2015) (quoting *State v. Emery,* 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012)). Under this heightened standard, the defendant must show that "no curative instruction would have obviated any prejudicial effect on the jury" and that the misconduct caused prejudice that "had a substantial likelihood of affecting the jury verdict." *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011). Asking a witness to opine as to whether one witness is lying about the case is improper because it invades the province of the jury. *Suarez-Bravo*, 72 Wn.App. at 366. However, the prosecutor in Duenas's case did not ask a question of the type that is prohibited by *Suarez-Bravo, supra.* The prosecutor did not ask Heather to speculate or

opine as to whether the victims were lying about the abuse or Duenas's involvement in the abuse. Instead, his question was aimed at clarifying the evidence that came out on cross-examination that the victims lie on occasion. RP 158. The prosecutor asked, "...if they would not be forthcoming with you, would it be about smaller stuff or would it be about a massive issue like this?" RP 159. His actual question asked about the prior lies the victims had told and what the nature of those prior lies were. His question did not ask Heather to speculate as to whether the victims were currently lying about Duenas or the sexual abuse, or whether Heather believed the victims' allegations of abuse. Thus, Duenas can show no improper conduct by the prosecutor in asking this question. The prosecutor simply attempted to correct the false impression that defense counsel gave to the jury through the limited cross-examination of Heather wherein he elicited that the victims lie.

Duenas has not shown any improper conduct by the prosecutor and his claim of prosecutorial misconduct fails.

II. Duenas Received Effective Assistance of Counsel

Duenas alleges his trial counsel was ineffective for failing to renew his objection to the admission of the victim's statements pursuant to RCW 9A.44.120. The trial court properly admitted the statements, and the change in the witness's testimony did not affect their admissibility.

Subsequently, Duenas's attorney's failure to renew his motion to exclude the child victim's statements was not prejudicial. Duenas's claim of ineffective assistance of counsel fails.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right of a criminal defendant to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). In *Strickland*, the United States Supreme Court set forth the prevailing standard under the Sixth Amendment for reversal of criminal convictions based on ineffective assistance of counsel. *Id.* Under *Strickland*, ineffective assistance is a two-pronged inquiry:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable.

Thomas, 109 Wn.2d at 225-26 (quoting *Strickland*, 466 U.S. at 687); *see also State v. Cienfuegos*, 144 Wn.2d 222, 226, 25 P.3d 1011

(2011) (stating Washington had adopted the *Strickland* test to determine whether counsel was ineffective).

Under this standard, trial counsel's performance is deficient if it falls "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The threshold for the deficient performance prong is high, given the deference afforded to decisions of defense counsel in the course of representation. To prevail on an ineffective assistance claim, a defendant alleging ineffective assistance must overcome "a strong presumption that counsel's performance was reasonable." *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Accordingly, the defendant bears the burden of establishing deficient performance. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A defense attorney's performance is not deficient if his conduct can be characterized as legitimate trial strategy or tactics. *Kyllo*, 166 Wn.2d at 863; *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) (holding that it is not ineffective assistance of counsel if the actions complained of go to the theory of the case or trial tactics) (citing *State v. Renfro*, 96 Wn.2d 902, 909, 639 P.2d 737 (1982)).

A defendant can rebut the presumption of reasonable performance of defense counsel by demonstrating that "there is no conceivable legitimate tactic explaining counsel's performance." *State v. Reichenbach*,

153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999). Not all strategies or tactics on the part of defense counsel are immune from attack. "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) (finding that the failure to consult with a client about the possibility of appeal is usually unreasonable).

To satisfy the second prong of the *Strickland* test, the prejudice prong, the defendant must establish, within reasonable probability, that "but for counsel's deficient performance, the outcome of the proceedings would have been different." *Kyllo*, 166 Wn.2d at 862. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *Thomas*, 109 Wn.2d at 266; *Garrett*, 124 Wn.2d at 519. In determining whether the defendant has been prejudiced, the reviewing court should presume that the judge or jury acted according to the law. *Strickland*, 466 U.S. at 694-95. The reviewing court should also exclude the possibility that the judge or jury acted arbitrarily, with whimsy, caprice or nullified, or anything of the like. *Id.* Also, in making a determination on whether defense counsel was ineffective, the reviewing court must attempt to eliminate the "distorting effects of hindsight, to reconstruct the circumstances of counsel's

challenged conduct, and to evaluate the conduct from the counsel's perspective at the time." *Id.* at 689. The reviewing courts should be highly deferential to trial counsel's decisions. *State v. Michael*, 160 Wn. App. 522, 526, 247 P.3d 842 (2011). A strategic or tactical decision is not a basis for finding error in counsel's performance *Strickland*, 466 U.S. at 689-91.

Statements made by a child under the age of ten that describe an act of sexual contact are admissible if the court finds the statements are reliable and the child testifies at the trial or there is corroboration of the act. RCW 9A.44.120. A trial court must consider several factors, known as the *Ryan* factors to determine admissibility of the statements; if the court finds these factors are substantially met, the statements are deemed reliable and are admissible at trial. *State v. Griffith*, 45 Wn.App. 728, 738-39, 727 P.2d 247 (1986). In this case, the trial court heard testimony pre-trial regarding statements H.A. made to her sister, K.L., and her mother, Heather, when she was nine years old describing the sexual abuse by Duenas. RP 5-55. The trial court considered the *Ryan* factors and found the statements were reliable. On appeal, Duenas alleges Heather testified inconsistently with her pre-trial testimony and her amended testimony rendered the child hearsay inadmissible. However, Duenas fails to point out to this court that though Heather did testify on direct that she told H.A.

that she had been told Duenas had touched her, that on cross-examination she adamantly denied this occurred and testified that she only told H.A. that K.L. told her something that was important for H.A. to tell her, but that there was no mention of "inappropriate touching." RP 163-64.

Based on Heather's testimony, it is clear her statement during the direct examination was a misstatement, and that the events that occurred were accurately portrayed in the pretrial hearing on the admissibility of the statements. The trial court considered the appropriate evidence in making its decision on the admissibility of these statements, and Duenas's defense counsel had no legitimate basis to renew his objection to the admission of the statements.

Duenas also argues that Heather's testimony during trial that H.A.'s attitude had changed over the summer of 2013 and that her negative attitude was directed at Duenas and at "the world," including Heather herself, was evidence of H.A.'s motive to lie. Heather also testified at trial that her children got along well with Duenas and they truly liked him. RP 160-61. This does not support any increased motive for H.A. to lie, in fact, the evidence of H.A.'s change in behavior and attitude is corroborative of the abuse she suffered. Furthermore, the evidence at trial clearly showed H.A. did not want to disclose the abuse, that the disclosure to her mother did not come out when H.A. was in trouble for

something, or during a fight with Duenas or anyone else, but rather was something H.A. was very reluctant to share.

Defense counsel was not ineffective for failing to renew his motion to exclude these statements, and any such motion would have been denied as the statements were reliable given consideration of the *Ryan* factors, and thus Duenas has suffered no prejudice. To establish prejudice, a defendant must show a reasonable probability that but for the deficient performance, the result of the proceeding would have been different. *State v. Thomas,* 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Thus, to show prejudice, Duenas must show a reasonable probability that had trial counsel renewed his motion to exclude the statements, the trial court would have granted that motion. *See Thomas,* 109 Wn.2d at 226. All the circumstances show these statements were reliable and properly admitted and that the trial court would have denied Duenas's renewed motion. Duenas cannot show his attorney was ineffective for failing to renew his motion, nor can he show any prejudice. Duenas's claim of ineffective assistance of counsel fails.

III. The Prosecutor did not Commit Misconduct and Any Potential Misconduct did not Prejudice Duenas

Duenas alleges the prosecutor committed prosecutorial misconduct during closing argument. The prosecutor did not commit misconduct

during closing and if any misconduct did occur, it was cured by the court's instructions, or was not so flagrant and ill-intentioned as to have denied Duenas a fair trial. Duenas's claim of prosecutorial misconduct fails.

A defendant has a significant burden when arguing that prosecutorial misconduct requires reversal of his convictions. *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011). To prevail on a claim of prosecutorial misconduct, a defendant must establish that the prosecutor's complained-of conduct was "both improper and prejudicial in the context of the entire record and the circumstances at trial." *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008) (quoting *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003) (citing *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997))). To prove prejudice, the defendant must show that there was a substantial likelihood that the misconduct affected the verdict. *Magers*, 164 Wn.2d 191 (quoting *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). A defendant must object at the time of the alleged improper remarks or conduct. A defendant who fails to object waives the error unless the remark is "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). When

reviewing a claim of prosecutorial misconduct, the court should review the statements in the context of the entire case. *Id.*

In the context of closing arguments, a prosecuting attorney has "wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence." *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (citing *State v. Gregory,* 158 Wn.2d, 759, 860, 147 P.3d 1201 (2006)). The purported improper comments should be reviewed in the context of the entire argument. *Id.* The court should review a prosecutor's comments during closing in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003); *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998).

In arguing the law, a prosecutor is confined to correctly characterizing the law stated in the court's instructions. *State v. Burton*, 165 Wn. App. 866, 885, 269 P.3d 337 (2012) (citing *State v. Estill*, 80 Wn.2d 196, 199-200, 492 P.2d 1037 (1972)). It can be misconduct for a prosecutor to misstate the court's instruction on the law, to tell a jury to acquit you must find the State's witnesses are lying, or that they must have a reason not to convict, or to equate proof beyond a reasonable doubt to everyday decision-making. *Id* (citing to *State v. Davenport*, 100 Wn.2d

757, 675 P.2d 1213 (1984), *State v. Fleming*, 83 Wn. App. 209, 921 P.2d 1076 (1996), *State v. Anderson*, 153 Wn. App. 417, 220 P.3d 1273 (2009), and *State v. Warren*, 165 Wn.2d 17, 195 P.3d 940 (2008)). Contextual consideration of the prosecutor's statements is important. *Burton*, 165 Wn. App. at 885.

Improper argument does not require reversal unless the error was prejudicial to the defendant. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). The court in *Davenport* stated:

> Only those errors [that] may have affected the outcome of the trial are prejudicial. Errors that deny a defendant a fair trial are per se prejudicial. To determine whether the trial was fair, the court should look to the trial irregularity and determine whether it may have influenced the jury. In doing so, the court should consider whether the irregularity could be cured by instructing the jury to disregard the remark. Therefore, in examining the entire record, the question to be resolved is whether there is a substantial likelihood that the prosecutor's misconduct affected the jury verdict, thereby denying the defendant a fair trial.

Davenport, 100 Wn.2d at 762-63.

In Duenas's case, any potential misstatement by the prosecutor did not affect the jury's verdict. Duenas was not denied a fair trial. The closing argument must be taken in the entire context of which it was given. Duenas did not object at trial to any of the statements to which he now assigns error. A defendant's failure to object to potential misconduct at trial waives his challenge to the misconduct unless no curative

instruction would have obviated the prejudicial effect on the jury and the misconduct caused prejudice that had a substantial likelihood of affecting the verdict. *State v. Emery*, 174 Wn.2d at 761. The main focus of this Court's analysis on a prosecutorial misconduct claim when the defendant did not object at trial is whether the potential prejudice could have been cured by an instruction. *Id.* at 762.

Duenas claims the prosecutor committed misconduct by saying "the defendant raped and molested his soon-to-be stepchildren." Duenas claims this was misleading and misstated the evidence because both victims were not raped, only one was. However, a reasonable inference from using the conjunctive "and" is not that both things occurred to both children, but that both of those things occurred, the rape to one child and the molestation to the other. This statement is in no way a misstatement of the evidence or tantamount to the prosecutor testifying. The absence of an objection from defense counsel is strong evidence that Duenas's proposed interpretation of this statement was not the ordinary understanding of the prosecutor's words. Also, by taking the entirety of the prosecutor's argument into consideration, and putting this statement in context, it is clear the prosecutor never argued Duenas raped both victims, and he only ever urged the jury to convict on the charged crimes, which included one

count of rape against one of the victims. Duenas's claims of prosecutorial misconduct on this statement are wholly without merit.

Duenas also argues the prosecutor committed misconduct by stating that it would not be a good society if we had to deal with child sex abuse on a daily basis. From the context of the argument, it is clear this was the prosecutor's attempt to broach a difficult subject with the jury. Some crimes arouse natural indignation, and while appeals to the jury's passion or prejudice are improper, acknowledgement of the heinous nature of the criminal acts alleged is not per se improper. *See State v. Borboa*, 157 Wn.2d 108, 123, 135 P.3d 469 (2006) and *State v. Claflin*, 38 Wn.App. 847, 849-50, 690 P.2d 1186 (1984). Child sex abuse is one such crime: it arouses natural indignation, and even the natural denial of its existence for some. By essentially telling the jury child sex abuse is not a fun subject and it would not be a good society if we had to deal with it every day, the prosecutor did not appeal to the passions and prejudices of the jury, but rather simply acknowledged the heinous and difficult nature of the subject matter and acknowledged the difficulty some may have with this subject and in evaluating the evidence the State had presented. This argument was not improper.

In *State v. Smiley*, ___ P.3d ___, 2016 WL 3999865 (Div. I, July 25, 2016), Division I of this Court found that a prosecutor's arguments

during closing in a child sex abuse case that if the jury did not convict it would be sending a message to children that their cases cannot be prosecuted because their word is not enough, was not so prejudicial that it could not have been cured by an instruction to disregard. *Smiley*, slip op. at 6. In that case, the prosecutor's statements went quite a bit farther than the statements the prosecutor made in Duenas's case did. The prosecutor simply acknowledged how hard this subject is, how difficult it is to think about, and to believe. This acknowledgement did not ask or urge the jury to convict on an improper basis. Here, the prosecutor's arguments were far less problematic than the prosecutor's in *Smiley*. In other cases, this Court has also found improper arguments were curable by an instruction. In *State v. Bautista-Caldera*, 56 Wn.App. 186, 783 P.2d 116 (1989), the prosecutor asked the jury to send a message about the general problem of child sex abuse, yet the appellate court found this improper argument was curable. *Bautista-Caldera*, 56 Wn.App. at 195. In *State v. Jones*, 71 Wn.App. 798, 863 P.2d 85 (1993), the prosecutor discussed society's concern for children, but then critiqued that children had to testify saying they must "walk in through those two big doors as a very, very small person and walk up here in front of twelve people, twelve grownups whom they don't know, and sit in this chair in a courtroom such as this, with the defendant sitting right there, staring at them." *Jones*, 71 Wn.App.

at 805-06. The Court found this improper argument was curable and therefore did not warrant reversal. *Id.*

Duenas further argues the prosecutor committed misconduct by arguing facts not in evidence when the State argued the evidence showed Duenas's rubbing of K.L.'s calf was him testing the waters, seeing if she was awake, and whether he was going to get a reaction. Duenas further analogizes this argument to the argument in *State v. Pierce*, 169 Wn.App. 533, 280 P.3d 1158, *rev. denied*, 175 Wn.2d 1025, 291 P.3d 253 (2012) where the prosecutor created out of whole cloth a first-person narrative of the defendant's thought process, and details of the victims' last thoughts and statements upon being kidnapped and robbed, pleading for their lives. *Pierce*, 169 Wn.App. at 543. A prosecutor does have wide latitude to argue inferences from the evidence. *Gregory*, 158 Wn.2d at 841. However, a prosecutor cannot urge the jury to decide the case based on evidence outside the record. *Pierce*, 169 wn.App. at 553.

In *Pierce*, the prosecutor attributed repugnant and immoral thoughts to the defendant and this inflamed the jury's prejudice against him. *Id.* at 554. The prosecutor's argument there was not based on any evidence admitted at trial, but was pure speculation. *Id.* While the prosecutor can make reasonable inferences from the evidence, a prosecutor cannot argue unreasonable leaps from the evidence. *See id.* at

555. But what the prosecutor here said is a far cry from the prosecutor's inflammatory argument in *Pierce, supra.* The prosecutor in this case argued reasonable inferences from the evidence: that the defendant's initial touching of K.L.'s calf, a non-intimate body part, was to test the waters. This argument is entirely reasonable given the evidence at trial and the nature of the allegation, and the fact that the behavior increased after the one minute of calf rubbing. Furthermore, the prosecutor explicitly told the jury that there was no way of knowing if this is what Duenas was thinking, but that it was his argument about what the evidence showed. The prosecutor stated,

> So what's going on at this point? Well, we can't get inside the defendant's head, but from the evidence, I would argue that what's going on is a couple of possibilities. One, he's testing the waters. He's rubbing her calf and seeing, okay, A. Is she awake? And B. Am I going to get some reaction? Because it's kind of an innocent part of the body. It's not obviously problematic.
>
> So he's rubbing her calf and he's not really getting a response. He's not getting her pushing away, so he continues. And he works his way up and he starts massaging her thigh. In no way appropriate to be doing that, to a 14-year-old when you're in your 20s.
>
> Then, he works his way to her vagina....

RP 397-98. This statement did not inflame the passions or prejudices of the jury and was not misconduct. Another important distinction in this

case, is that the alleged improper statement is quite brief, whereas the prosecutor's first-person argument in *Pierce* was lengthy and detailed.

The prosecutor's argument below did not rise to the level of misconduct seen in *Pierce*. The statement was brief; it comprised two sentences during the prosecutor's entire argument, and was not inflammatory. A curative instruction easily could have cured any resulting prejudice. Duenas cannot show reversible misconduct for this brief and proper argument.

Duenas also argues that the prosecutor committed misconduct by arguing the details that K.L. described "should send shivers" down them because of the amount of detail she shared. "Urging the jury to render a just verdict that is supported by evidence is not misconduct." *State v. Curtiss*, 161 Wn.App. 673, 701, 250 P.3d 496 (2011). In *Curtiss*, the prosecutor asked the jury, "[d]o you know in your gut—do you know in your heart that Renee Curtiss is guilty as an accomplice to murder? The answer is yes." *Id.* The Court on appeal found no misconduct in this argument stating "the State's gut and heart rebuttal arguments in this case were arguably over simplistic but not misconduct." *Id.* at 702. That is the most that could be said for the prosecutor's statement here. This argument by the prosecutor urged the jury to consider the context and content of the victim's testimony to then find it credible. By saying that the details K.L.

shared should send shivers down some of the jurors was not an attempt to procure an emotional response from the jury, but an attempt to emphasize the believability of K.L.'s testimony and account of what happened because of the details she shared. By saying the testimony should send shivers down the jury is tantamount to arguing the jurors would have a gut-level understanding and belief in the evidence, similar to what the prosecutor argued in *Curtiss, supra.* As in *Curtiss*, the argument here was not misconduct. Further, Duenas cannot show that this statement would not have been cured by an instruction to the jury to disregard it.

Duenas also argues that the prosecutor improperly invited the jury to consider the emotional impact of the crimes on the victims and their mother. However, Duenas's argument in this respect is somewhat misleading. In reading the entirety of the prosecutor's argument on this subject, it is clear the prosecutor was not improperly asking the jury to consider the emotional effect a conviction or acquittal would have on the victims and thus make a decision for that improper reason. Rather, the prosecutor argued the emotional effect the abuse had on the victims that the jury heard evidence of, is corroborative evidence of the sexual abuse. RP 412. The prosecutor argued that similar to physical evidence of an assault, like an injury, emotional injury from sexual abuse can be considered as evidence of the crime. This is perfectly appropriate and

acceptable as argument. A child's change in attitude and behavior can be evidence that a traumatic event occurred. It was simply a small corroborating piece of the prosecutor's argument. Duenas's argument that the prosecutor improperly argued the jury should base its decision on emotion from this argument is misleading and not supported by the record.

Duenas also argues the statement that defense counsel's argument was "absolutely egregious" and that counsel was "misleading" the jury constituted misconduct for impugning the integrity of defense counsel. Duenas states in his brief, "[t]he remark of 'what he is accusing them of doing is absolutely egregious' is particularly troublesome. It casts defense counsel in the role of someone who has offended community values: how dare counsel act so unethically as to accuse the children of lying? The prosecutor's moral disapproval of counsel's argument is palpable." Br. of Appellant, p. 34. However, Duenas misinterprets the prosecutor's statement. The prosecutor did not say that defense counsel was acting egregiously by arguing the victims were lying and falsely accused the defendant. The prosecutor was arguing that the act of lying and falsely bringing sex abuse claims against an innocent person is egregious. Essentially, the prosecutor argued that the victims in this case lying about the abuse and bringing false charges against an innocent man would be egregious. So egregious that it's impossible to believe. The prosecutor

never argued that defense counsel acted egregiously, or was immoral or unethical. The prosecutor's argument simply did not disparage defense counsel, and Duenas's argument that it did misunderstands the statement and takes it out of context. As discussed above, this Court must consider the alleged improper statements within the context of the entire argument. When that is done, the prosecutor clearly did not impugn defense counsel and did not malign him or show his own disapproval of the defense attorney's immoral actions. Duenas's arguments are without merit.

It is improper for a prosecutor to disparage defense counsel's role or impugn his or her integrity. *Thorgerson*, 172 Wn.2d at 451 (citing *State v. Warren*, 165 Wn.2d 17, 29-30, 195 P.3d 940 (2008) and *State v. Negrete*, 72 Wn.App. 62, 67, 863 P.2d 137 (1993)). There, our Supreme Court found it is improper for a prosecutor to call defense counsel's presentation "bogus" or involving "sleight of hand." *Thorgerson*, 172 Wn.2d at 452. However, even with those improper remarks, the Court found no prejudice as these statements were not likely to have altered the outcome of the case. The prosecutor's remarks in *Thorgerson* told the jury to disregard irrelevant evidence, and focused on the evidence before the jury. *Id.* The Supreme Court found that though the remarks were improper, they were not prejudicial, and reversal was not warranted. *Id.* The prosecutor's statements in Duenas's case were significantly less improper

than those the prosecutor made in *Thorgerson*, if they were improper at all.

In this argument, Duenas claims the prosecutor committed misconduct by arguing that defense counsel's argument was "misleading" when defense counsel argued the State could not prove its case beyond a reasonable doubt because there was no corroborating evidence like an eye-witness, DNA evidence, or physical evidence. The prosecutor did not impugn the role of defense counsel in his argument. The prosecutor's argument that the defendant was raising the bar above the beyond a reasonable doubt standard by arguing that physical evidence was required in order to convict was proper. The prosecutor argued to the jury, "Nowhere in any jury instruction that the Judge read or you will read in that packet says I need DNA. It's not going to be in there." RP 429. The prosecutor further argued that the law required he prove the case beyond a reasonable doubt. RP 430. The prosecutor's argument then stated,

> So when you are analyzing arguments the defense made, you got to ask yourself, does it affect my abiding belief that this happened? And the defense argument can be effective, but it's misleading because I don't have to put on a perfect case. The law doesn't require me to put on a perfect case. That's why I don't have to prove my case beyond all possible doubt whatsoever. I only have to prove beyond a reasonable doubt.

RP 430. The prosecutor also argued that

> ...what the defense is confusing when they're making all these points, is the difference between something that is an imperfection in my case, and something that genuinely raises a doubt. And that is a very important distinction. And do not make the mistake of equating simply imperfection with doubt.

RP 431. The prosecutor drew the jury back to his burden of proof and told the jury, "the question for you is, do I have an abiding belief that this happened?" RP 431. The prosecutor focused his arguments on the evidence, on his burden of proof, and on how the defendant's arguments did not diminish the strength of his evidence. The reasoning and holding in *Thorgerson, supra* apply here. The prosecutor's statements focused on the evidence before the jury, and argued only that the State had met its burden under the correct standard of law. The prosecutor did not impermissibly impugn defense counsel's integrity, and even if that did occur, it was so fleeting so as to cause no prejudice. Duenas's claims of prosecutorial misconduct fail.

IV. Cumulative Error did not Deprive Duenas of a Fair Trial

Duenas argues cumulative error denied him a fair trial. As discussed in each of the preceding sections, Duenas has not shown any error below, let along cumulative error that together affected the outcome of his trial.

The defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994). Where no prejudicial error is shown to have occurred, cumulative error cannot be said to have deprived the defendant of a fair trial. *State v. Stevens,* 58 Wn. App. 478, 498, 794 P.2d 38 (1990). The cumulative error doctrine does not provide relief where the errors are few and had little to no effect on the outcome of the trial. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). As discussed above, Duenas has failed to show error, or how each alleged error affected the outcome of his trial. Further, Duenas has not shown how the combined error affected the outcome of his trial. Accordingly, Duenas's cumulative error claim fails.

V. The State Agrees the Conviction for Child Molestation should be Vacated.

Duenas argues his convictions for rape of a child and child molestation in Counts 1 and 2 violate double jeopardy. The State does not concede that rape of a child and child molestation are the same offense for double jeopardy, generally. *See State v. Jones*, 71 Wn.App. 798, 824-25, 863 P.2d 85 (1993). However, pursuant to the facts and the arguments made in this particular case, because the State did not clarify separate offenses in its argument to the jury, the State agrees this Court should

vacate the child molestation conviction entered below. As the trial court found the two convictions encompassed the same criminal conduct and did not score the offenses against each other, this vacation does not affect Duenas's sentence. Duenas's standard range sentence on the Rape of a Child in the First Degree conviction should be affirmed.

The remedy for double jeopardy is to vacate the conviction for the lesser offense. *State v. Weber*, 159 Wn.2d 252, 266, 149 P.3d 646 (2006). Rape of a Child in the First degree is a class A felony. RCW 9A.44.073(2). Child Molestation in the First Degree is also a class A felony. RCW 9A.44.083(2). However, Child Molestation in the First Degree has a seriousness level of 10, while Rape of a Child in the First Degree has a seriousness level of 12. RCW 9.94A.515. The "lesser offense" for double jeopardy purposes is the crime which carries the lesser sentence. *Weber*, 159 Wn.2d at 269. In this case, the Child Molestation in the First Degree carries the lesser sentence. *See* CP 60. Child Molestation in the First Degree is the lesser offense and the one that should be vacated. As Duenas suggests, this Court should remand for vacation of the Child Molestation in the First Degree conviction and enter an amended judgment reflecting as such.

VI. The State Agrees the Sentence on Count 4 Exceeds the Statutory Maximum Sentence

Duenas argues the trial court's sentence on Count 4 exceeds the statutory maximum. Duenas is correct and this Court should remand for resentencing on Count 4.

A term of community custody and a prison term may not, when combined, exceed the statutory maximum of a sentence. RCW 9A.20.021; RCW 9.94A.701(9). In *State v. Boyd*, 174 Wn.2d 470, 275 P.3d 321 (2012), our Supreme Court addressed this exact issue after a defendant was sentenced to 54 months in prison and 12 months on community custody, even though the maximum term of his sentence was 60 months. *Boyd*, 174 Wn.2d at 472. The Supreme Court remanded the defendant's case for the trial court to either reduce the term of community custody or resentence the defendant to be in compliance with RCW 9.94A.701(9). *Id.* at 473.

Duenas's conviction on Count 4 is for a Class C felony with a statutory maximum sentence of 60 months. RCW 9A.20.021(1)(c). Duenas was sentenced to 54 months confinement and 36 months of community custody on Count 4. The term of community custody, when added to the prison term imposed, exceeds the statutory maximum of 60 months. Given that Duenas's conviction for Counts 4 exceeds the statutory maximum, this Court should remand to the trial court to amend the

community custody term or resentence Duenas in order to comply with the statutory maximum sentence.

VII. The State Agrees and Concedes the Plethysmography Testing Condition is Improper

Duenas assigns error to the trial court's imposition of a condition of community custody that requires he submit to plethysmography exams at the direction of a community custody officer. The State agrees and concedes that the imposition of this condition was improper and the matter should be remanded to strike this condition from his judgment and sentence.

Duenas was sentenced to a community custody condition that requires Reeves to "[s]ubmit to plethysmography exams, at your own expense, at the direction of the community corrections officer and copies shall be provided to the Prosecuting Attorney's Office upon request." CP 76. In *State v. Land, 172 Wn.App. 593, 295 P.3d 782 (2013),* this court held that a condition requiring an individual to submit to plethysmograph testing subject only to the discretion of a community corrections officer violates a defendant's constitutional right to be free from bodily intrusions. *Land,* 172 Wn.App. at 605. This Court concluded that while plethysmograph testing "can properly be ordered incident to crime-related treatment by a qualified provider," the testing "may not be viewed as a

routine monitoring tool subject only to the discretion of a community corrections officer." *Land,* 172 Wn.App. at 605.

In *State v. Riles,* 135 Wn.2d 326, 343–45, 957 P.2d 655 (1998), *abrogated on other grounds by State v. Valencia,* 169 Wn.2d 782, 239 P.3d 1059 (2010), the Washington Supreme Court upheld conditions requiring plethysmograph testing as part of the defendant's sexual deviancy treatment. The court concluded that plethysmograph testing is "a treatment device that can be imposed as part of crime-related treatment or counseling." *Riles,* 135 Wn.2d at 345. However, "[i]t is not permissible for a court to order plethysmograph testing without also imposing crime-related treatment" because "[p]lethysmograph testing serves no purpose in monitoring compliance with ordinary community placement conditions." *Riles,* 135 Wn.2d at 345.

Here, the court ordered Duenas to participate in plethysmograph testing at the sole discretion and direction of his community custody officer. This is factually on par with *Land* and distinguishable from *Riles*. Therefore, it appears the condition regarding plethysmography testing was imposed for the purpose of monitoring Duenas, and not as part of his treatment requirements. This Court should remand this matter with direction to strike the offending condition from Reeves' sentence.

VIII. The trial Court properly ordered Duenas have no relationship with anyone with children

Duenas argues the community custody condition prohibiting him from entering into a relationship with anyone who has minor aged children residing in or visiting their home without approval is unconstitutionally vague. This claim fails.

This Court reviews a trial court's imposition of crime-related conditions for an abuse of discretion. *State v. Cordero,* 170 Wn.App. 351, 373, 284 P.3d 773 (2012). A sentencing court abuses its discretion if its decision is manifestly unreasonable or if exercised on untenable grounds or for untenable reasons. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). Trial courts may impose crime-related prohibitions while a defendant is on community custody. RCW 9.94A.505(8), .703(3)(f). A "'[c]rime-related prohibition' ... prohibit[s] conduct that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10). Further, a sentencing court has the discretion to order an offender to refrain from "direct or indirect contact with the victim of the crime or a specified class of individuals." RCW 9.94A.703(3)(b). Duenas's crimes involved children with whom he came into contact through a social relationship with their mother, therefore this condition is reasonably crime-related and is necessary to protect the public. *See State*

v. Kinzle, 181 Wn.App. 774, 785, 326 P.3d 870 (2014) (citing to *State v. Autrey*, 136 Wn.App. 460, 468, 150 P.3d 580 (2006)). In *Kinzle*, Division I of this Court found that an almost identical community custody condition was appropriate because the defendant's crime involved children with whom he came into contact due to his relationship with their parents. *Id.* The same is true in Duenas's case: he came into contact with K.L.'s and H.A.'s mother by forming a relationship with her, eventually moving in with her and her children, and thus gaining access to them, facilitating his abuse of them. It is entirely reasonable to protect the public by prohibiting him from forming another such relationship. In *Kinzle*, the Court considered nearly identical language, prohibiting the defendant from forming "relationships" with those with minor children much as the trial court prohibited Duenas from doing below. There, the Court found this language was not unconstitutionally vague, nor was it overbroad or unnecessary. *Id.*

As in *Kinzle, supra*, the trial court had sufficient cause to prohibit Duenas from forming relationships with those who have minor children living with them in order to protect the public. This condition is reasonably crime-related and is not unconstitutionally vague. The trial court's imposition of this condition should be affirmed.

IX. This Court Should Decline to Consider Appellate Costs Prior to the State's Submission of a Cost Bill

Duenas argues under *State v. Sinclair*, 192 Wn.App. 280, 367 P.3d 612 (2016) that this Court should not impose any appellate costs if the State substantially prevails on this appeal as he is indigent. The State respectfully requests this Court refrain from ruling on the cost issue until it is ripe.

Under RCW 10.73.160, an appellate court may provide for the recoupment of appellate costs from a convicted defendant. *State v. Blank*, 131 Wn.2d 230, 234, 930 P.2d 1213 (1997); *State v. Mahone*, 98 Wn.App. 342, 989 P.2d 583 (1999). The award of appellate costs to a prevailing party is within the discretion of the appellate court. *State v. Sinclair*, 192 Wn.App. 380, 386, 367 P.3d 612 (2016); *see* RAP 14.2; *State v. Nolan*, 141 Wn.2d 620, 8 P.3d 300 (2000). However, the appropriate time to challenge the imposition of appellate costs should be when and only if the State seeks to collect the costs. *See Blank*, 131 Wn.2d at 242; *State v. Smits*, 152 Wn.App. 514, 216 P.3d 1097 (2009) (citing *State v. Baldwin*, 63 Wn.App. 303, 310-11, 818 P.2d 1116 (1991)). The time to examine a defendant's ability to pay costs is when the government seeks to collect the obligation because the determination of whether the defendant either has or will have the ability to pay is clearly somewhat speculative.

argument, the Court should excuse any indigent defendant from payment of costs. This would, in effect, nullify RCW 10.73.160(3).

In *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), the Court indicated that trial courts should carefully consider a defendant's financial circumstances, as required by RCW 10.01.160(3), before imposing discretionary LFOs. But, as *Sinclair* points out, the Legislature did not include such a provision in RCW 10.73.160. Instead, it provided that a defendant could petition for the remission of costs on the grounds of "manifest hardship." *See* RCW 10.73.160(4).

In this case, the State has yet to "substantially prevail" and has not submitted a cost bill. The State respectfully requests this Court wait until the cost issue is ripe, if it ever becomes so, before ruling on this issue.

D. CONCLUSION

Duenas's claims of reversible error fail. The convictions should be affirmed and the case remanded for resentencing as discussed above.

DATED this 26th day of September, 2016.

Respectfully submitted:

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